Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

EILEEN M. BRAKE

Petitioner

vs.

EVE MURPHY AND RICHARD MURPHY

Respondents

On Petition for Writ of Certiorari to
the Supreme Court of the State of Florida
and the Court of Appeal, Third District, State of Florida

PETITION FOR WRIT OF CERTIORARI

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60 pp

QUESTIONS PRESENTED

First Question Presented

Does Article 5, Section 3 (b) (3) of the Florida Constitution, as interpreted by the Florida Supreme Court to prevent its review and reconciliation of patent conflicts between the decisions of geographical District Courts of Appeal if the conflicts are not written in an Opinion, violate Petitioner's 14th Amendment guarantee of due process and equal protection of laws within the State by denying her access to a forum to reconcile the conflicts between the decisions in her case and decisions by two other District Courts of Appeal on identical facts, because the Third District Court of Appeal refused to write an opinion on the conflicting points and the Florida Supreme Court refused to consider any method of review and reconciliation?

Second Question

Does the failure of the Third District Court of Appeal

1) to conform, in the case at bar, to the rulings of its sister courts granting new trials for excessive delay of trial judges in ruling after non-jury hearings (and to a ruling of the United States Supreme Court on similar facts), and

2) to write an opinion on its failure to grant a new trial, thus denying her access to the Florida Supreme Court to reconcile the differences between rulings,

violate Petitioner's 14th Amendment rights to due process and equal protection by making in-state location the key to obtaining a new trial for staleness?

Third question presented.

Does the failure of the Third District Court of Appeal

1) to conform, in the case at bar, to the rulings of its sister District Courts of Appeal as to requirements for disqualification of a judge on the grounds of feared prejudice, and

2) to write an opinion on its failure to conform to such disqualification requirements, thus denying her access to the Florida Supreme Court to reconcile the differences between rulings,

violate Petitioner's 14th Amendment rights to due process and equal protection of the laws of her State by making in-state location the key to obtaining disqualification of a judge?

LIST OF PARTIES

The names of all parties in the trial and appellate proceedings below appear in the caption to this case

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OPINIONS BELOW

The opinion of the District Court of Appeal, Third District, for the 1994 appeal is reported in 636 So 2d 72. The opinion of the District Court of Appeal, Third District, for the 1995 appeal after remand, and the Florida Supreme Court on Petitioner's petition to it, have not yet been reported. Copies of said opinions and Orders are attached hereto in the Appendix to this Petition.

JURISDICTION

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Florida entered on the 15th day of December, 1995 and the judgments of the District Court of Appeal, Third District, entered on the 22nd day of March, 1994 and, after remand, on the 16th day of August, 1995, for which a timely Motion for Rehearing was denied on October 11, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (a) and Rule 10 of the Supreme Court Rules because the rulings of the courts below decide important questions of the Federal law under the 14th Amendment which have not been, but should be, settled by this Court, and have decided Federal questions under the 14th Amendment in a way that conflicts with applicable decisions of this court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portions of the constitutional provisions and statutes involved are as follows:

"Section 1, Amendment 14, United States Constitution:

"No state shall... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"Article 5, Section 3 (b) (3) Constitution of the State of Florida

"(The Florida Supreme Court) may review any decision of a District Court of Appeal that ... **expressly** and directly conflicts with the decision of another District Court of Appeal or of the Supreme Court on the same question of law" (emphasis added).

"Florida Statutes Section 38.10 Disqualification of judge for prejudice; application; affidavits; etc. -

"Whenever a party to any action or proceeding makes and files an affidavit stating that he fears he will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse party, the judge shall proceed no further, but another judge shall be designated..."

"Code of Judicial Conduct Rule 2.050 (f). Duty to Rule within a Reasonable Time.

"Every judge has a duty to rule upon and announce an order or judgment on every matter submitted to that judge within a reasonable time. Each judge shall maintain a log of cases under advisement and inform the chief judge of the circuit at the end of each calendar month of each case that has been held under advisement for more than 60 days."

"Florida Rule of Judicial Administration 2.160. Disqualification of Trial Judges. (f) Determination - Initial Motion.

"The judge against whom an initial motion to disqualify ... is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action. If any motion is legally insufficient, an order denying the motion shall immediately be entered. No other reason for denial shall be stated, and an order of denial shall not take issue with the motion."

"Canon of Judicial Conduct 3 E Disqualification

"(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned..."

Rules of Professional Conduct 4-8.3. Reporting Professional Misconduct.

(b) Reporting Misconduct of Judges

"A lawyer having knowledge that a judge committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority."

STATEMENT OF THE CASE

This was a surcharge action against a former Personal Representative of her deceased mother's estate for alleged

breach of fiduciary duty because she did not accept, on behalf of the estate and 7 co-owners and beneficiaries, a 3d party offer to buy certain real property 96% owned by the Estate, but instead made a counteroffer which was not accepted. Only one co-owner/beneficiary claimed to have requested acceptance of the 3d party offer. The others wanted better terms.

The case was tried by the Court without a jury.

The first day of trial was **December 3, 1990**. The case resumed for an additional 3 days in **July, 1991**, 6 days in **December, 1991**, and 5 days in **March, 1992**, ending on **March 9, 1992**, *462* days after trial began. The testimony was not transcribed until after the final Order was entered and the appeal was filed.

At a status conference in the main Estate on **June 12, 1992**, (**3 months** after the trial ended and **one year** before the final Order was entered), the Court announced that, as to the surcharge action, he did not remember all of the testimony and that his notes were incomplete and lost. He also inaccurately recited testimony of Petitioner and did not acknowledge correction.

Six months after trial ended Petitioner filed a motion for a new trial on the grounds of staleness, citing **Polizzi v Polizzi,** 600 So 2d 490 (Fla App 5th DCA, 1992). Two days later the Court entered an Order denying said motion

One year after trial ended Petitioner filed a second motion for a new trial on the grounds of staleness, again citing the **Polizzi** case. Six days later the Court entered an Order denying said motion. During this period of time Petitioner also filed Petitions requesting the trial judge to disqualify himself for prejudicial remarks and actions. These motions were denied.

Finally, **469 days** after trial ended, the Court entered an *Order Surcharging Eileen Brake*, based partly on evidence not in the record

An appeal was taken. Petitioner raised the staleness/timeliness issue and the disqualification issue, citing conflicting cases in other District Courts of Appeal.

The Court ignored these issues and the case was remanded to the Court below on another point. Petitioner filed a motion for an evidentiary hearing, since there had never been a hearing on the issue of damages. The Court did not rule on the request and did not hold a hearing. Instead, **194 days** after remand, **770 days** after the last day of trial, and **1,238 days** (more than **41 months**) after the first day of trial, he entered a second Order which, like the first, was also based partly on additional evidence not in the record.

In the meantime, Petitioner's counsel had discovered facts which raised an additional, and more serious, question of the impartiality of the trial judge. These facts are:

Joseph H. Murphy, Jr. was lead counsel for his mother and uncle in the case at bar.

In 1986 Joseph H. Murphy, Jr. was appointed Personal Representative of the estates of Mary Gertrude Brunstetter and Theodore Keller. The Brunstetter estate had more than $2,000,000 in assets and the Keller estate more than $1,000,000. Both decedents had no surviving spouse or lineal descendants. Each Will named charities as the specific beneficiaries, and distant (in both consanguinity and geography) relatives as residuary beneficiaries.

By 1988 Joseph H. Murphy, Jr. had converted all assets in both estates into cash. However, he did not file accountings, or waivers, or petitions for discharge and distribution, or tax receipts, or beneficiaries' receipts, as required by statute. Instead, he did nothing of record.

In 1990, approximately one month before the filing of the surcharge action against Eileen Brake, Judge Newman entered Orders closing both estates without requiring the statutory predicates, even though Joseph H. Murphy, Jr., regularly appeared before him in this and other estates, and could have been directed to comply.

In 1994 Petitioner's undersigned attorney accidentally discovered the status of the two estates. By this time Joseph H. Murphy, Jr., had been disbarred; a civil judgment had been entered against him for wrongfully taking several hundred thousand dollars from other estates, and a criminal proceeding was pending against him for doing so.

Under Florida Rule of Professional Conduct 4-8.3, both Petitioner (who is a member of The Florida Bar and the bar of this Court) and her undersigned attorney were required to report this apparent wrongdoing to the appropriate authorities. They consulted longtime friends, United States District Judge C. Clyde Atkins and former Third District Court of Appeals Judge Mallory Horton, both of whom advised that the matter be reported to the Chief Judge of the 11th Judicial Circuit, the Honorable Leonard Rivkind.

This was done. Judge Rivkind requested an investigation by the Dade County State Attorney's office. Eventually the matter was also investigated by the Federal Bureau of Investigation, the Internal Revenue Service, and the Florida Judicial Qualifications Commission.

Petitioner feared that she would not receive a fair hearing from Judge Newman because:

a) the fact that the extended investigation of Judge Newman, and his relationship to Mr. Murphy, was triggered by the undersigned's actions in reporting the matter to Judge Rivkind would, in human experience, trigger a reaction against the "whistleblower"; and

b) the closing, and the circumstances thereof, of the two estates in violation of the probate code gave indications of a close relationship and perceived favoritism between Judge Newman and Mr. Murphy.

Petitioner therefore filed a new Affidavit/Petition for Disqualification. Judge Newman immediately entered an Order denying disqualification. However, Petitioner's fears appeared well-founded when, on the same day that he refused to disqualify himself, Judge Newman signed an Order formalizing an award of fees to the undersigned attorney for representation of another client (which had been orally approved at a prior hearing), but then penned in an addition to the Order that the money should not be distributed "pending further order of the Court". 19 months later the "further order" has not been entered. The trial judge has entered other orders which appear to be vengeful, retaliatory and illegal which have triggered further appeals.

Petitioner filed an appeal to the Third District Court of Appeal on the Order on Remand. She again raised the staleness/timeliness and disqualification issues and cited the cases in the 4th and 5th District Courts of Appeal. She also raised the 14th Amendment issues of due process and equal protection of the laws. A different panel of the Third District Court of Appeal entered a per curiam decision without opinion and denied a Motion for Rehearing .

Petitioner then sought review and reconciliation of the conflicts by the Florida Supreme Court. Article 5, Section 3 (b) (3) of the Florida Constitution, as interpreted by the Florida Supreme Court, limits the jurisdiction of that court in conflict situations to cases where the conflict is expressed in a written opinion. Because the District Court did not write an opinion Petitioner could not use the normal conflict procedure of Florida Appellate Procedure Rule 1.920 (c) . Instead she petitioned the Florida Supreme Court:

1. to consider the constitutionality of this limitation under the 14th Amendment, or

2. to provide an alternate means of consideration of unwritten conflicts by reversing earlier decisions and either granting a common law Writ of Certiorari, or issuing a Writ of Mandamus directing the Third District Court of Appeal to write an opinion explaining its divergence from its sister District Courts, or using any other method of relief. The Florida Supreme Court denied the petition.

REASONS FOR GRANTING THE WRIT

The Orders of the Courts below ruled on 14th Amendment Federal questions which either have not been, but should be, settled by this court, or were decided in a way that conflicts with applicable decisions of this Court.

For 40 years this Court has held that, while a state is not required to establish avenues of appellate review, once a state does so, those avenues must be kept free of unreasonable distinctions (**Griffin v Illinois,** 1956, 351 US 12, 76 S Ct 585, 590, 100 L Ed 891; **Lindsey v Normet,** 1972, Ore, 405 US 56; 92 S Ct 862, 876; 31 L Ed 2d 36; **Williams v Oklahoma City,** 1969, Ok, 395 US 458; 89 S Ct 1818, 1819, 23 L Ed 2d 400; **Draper v State of Washington,** 1963, 372 US 487, 83 S Ct 774, 9 L Ed 2d

899; **Rinaldi v Yeager,** 1966, 384 US 305, 86 S Ct 1497, 1500, 16 L Ed 2d 577).

The classifications made by the Florida Constitution and the courts below are neither reasonable nor rational, and deprive litigants such as Petitioner of their 14th Amendment rights in at least three ways:

1. Failure of the Florida Supreme Court to oversee and adjust the conflicting rulings because they are unwritten and do not qualify for the "express conflict" constitutional provision. Conflicts are no less unjust and discriminatory because the District Court fails to write an opinion.

2. Failure of the Third District Court of Appeal to require a new trial for staleness. If Petitioner lived 15 miles north across the Broward County line the Fourth District Court of Appeal would have required a new trial because of the excessive lapse of time between the end of trial and the rendition of the Order. If she lived in Daytona Beach the Fifth District Court of Appeal would have done likewise. Instead, she lives in Dade County, and the Third District Court of Appeal refused to require a new trial. Same state, different ruling, despite the 14th Amendment.

3. Failure to disqualify the trial judge for the appearance of bias. If she lived 15 miles north across the Broward County line the Judge would have been required to disqualify himself under the rulings of the 4th District Court of Appeal. Instead, she lives in Dade County and the Third District Court of Appeal refused to require disqualification. Same state, different ruling, despite the 14th Amendment.

With regard to each of these issues in turn:

a. **The rule prohibiting the Florida Supreme Court from overseeing and adjusting conflicting rulings.**

The current rule prohibiting the Florida Supreme Court from adjusting conflicts between rulings of District Courts of Appeal is unique among the 39 American jurisdictions having a two-tier appellate system. Even Florida provided for such relief before 1980.

i. **Before the 1980 Amendment**.

For the first nine years after Article V was amended in 1956 to provide for the District Courts of Appeal, the Florida Supreme Court held that a *per curiam* decision without opinion could not be reviewed by it on Petition for Certiorari based on "direct conflict" ***except*** in those rare cases where the "restricted examination required in proceedings in certiorari [revealed] that a conflict had arisen with *resulting injustice to the immediate litigant.*" (**Lake v Lake,** 103 So 2d 639, Fla, 1958, cited by Justice Sundberg in **Jenkins v State,** 385 So 2d 1356 at 1358, Fla 1980. Emphasis added).

Sometimes, when confronted by instances of "resulting injustice", the Court required the District Court to write an opinion explaining its conflicting decision so that it could analyze and resolve the conflict (see **Rosenthal v Scott,** 131 So 2d 480, Fla, 1961, citing **State v Bruno,** 104 So 2d 588 Fla, 1958). In other instances the Court issued writs of certiorari.

After 1965 the Court allowed conflicting unwritten decisions to be presented to it by Writs of Certiorari (**Foley v. Weaver Drugs, Inc.**, 177 So 2d 221, Fla 1965).

ii. After the 1980 Amendment.

Three months after the 1980 Amendment inserted the "express conflict" language into Article V, the Florida Supreme Court decided the case of **Jenkins v State**, 385 So 2d 1356 (Fla 1980), in which it announced that it would not accept conflict jurisdiction unless there was express wording in an opinion which conflicted with express wording in an opinion of another District Court or the Supreme Court. (See also **School Board of Pinellas County v District Court of Appeal,** 1985, Fla, 467 So 2d 985; **Haines City Community Development v. Heggs,** Fla, 658 So 2d 523, 525 note 2; **St. Paul Title Ins Co v Davis,** Fla, 1980, 382 So 2d 1304).

The dangers of failure to decide unwritten conflicts were pointed out by Justice Adkins in his dissent in the **Jenkins** case (quoting Justice Drew in **Foley v Weaver Drugs, Inc.,** 177 So 2d 221, Fla, 1965). It

> "...would result in utter chaos in the judicial system of this State... if it were impossible for this Court to maintain consistency and uniformity of the law in such cases. A different rule of law could prevail in every appellate district without the possibility of correction" (385 So 2d at 1364).

That is the situation that faces Petitioner in the case at bar.

This is a violation of the due process and equal protection of the laws clauses of the 14th Amendment. It means that the geographical area within the State where a party lives and litigates determines the law to be applied, and whether justice is done. And it means that a District Court of Appeal can foreclose any possibility of uniformity in rules,

and deprive a litigant of her Constitutional rights, simply by failing to write an opinion.

More than a dozen years after the **Jenkins** opinion, Third District Court of Appeal Judge Gerald Cope examined the experience of Florida under the **Jenkins** rule; compared it with the rules and experiences of the 39 other American jurisdictions having two-tier appellate systems; and found Florida's system to be severely flawed ("*Discretionary Review of the Decisions of Intermediate Appellate Courts: A comparison of Florida's system with those of the other States and the Federal System,*" 45 Fla L Rev 21).

In addition to the fears expressed by Justice Adkins in the **Jenkins** case, Judge Cope found:

a. the rule was unique among the two-tier jurisdictions. Each of the others, including this Court, allow an avenue for review of unwritten conflicts (p. 73).

b. there was no standard or regulation governing when to write an opinion (p 78), resulting in different standards as to what was important (p 79);

c. there were affirmances without opinion when justiciable issues needed to be resolved (p 79; 83-84);

d. there was preclusion of issues presented to the Florida Supreme Court in contemporaneous cases (p 85); and

e. there was review by the United States Supreme Court of Florida District Court cases without opinion, thus bypassing the Florida Supreme Court (p79-80) and increasing the workload of the United States Supreme Court.

f. the rule violated the American Bar Association guidelines (page 72)

Judge Cope pointed out that:

> "In virtually no (other) jurisdiction is the absence of a written opinion, or the absence of an opinion discussing the point at issue, given preclusive effect. Exceptions are found in California and Alabama, but those states provide the litigant with an alternative avenue to obtain supreme court review....
>
> "In California practice... a litigant must call an omission or misstatement to the attention of the court of appeal, which may elect to amend or amplify its opinion. However, if the court of appeal chooses not to do so, the litigant is free to petition for review in the supreme court. Alabama has a similar rule..." (p 73).

He urged that the "express opinion" requirement be changed (p 103).

In the case at bar Petitioner fulfilled the California requirement by pointing out to the Third District Court of Appeal in her Motion for Rehearing the 14th Amendment issues. The District Court ignored her. Because of that, in all other two-tier jurisdictions in the United States she would have been entitled to petition the state Supreme Court for review. Florida refused her the right to do so.

Failure to offer Petitioner a method of relief deprives Petitioner, and persons like her, of rights afforded litigants in every other two-tiered appellate system in America to have their state Supreme Court consider conflicts in rules adopted

by different districts. This is clearly in violation of the due process and equal protection of the laws clauses of the 14th Amendment. Failure to grant relief in the circumstances of the case at bar would be another violation of the 14th Amendment.

This Court is the only practical vehicle to correct this practice. This Court has an equal protection and due process duty to do so.

b. Promptness in a judge's ruling after trial has ended.

Rule 2.050 (f), Florida Rules of Judicial Administration, requires a trial judge in a non-jury trial to rule promptly after trial is ended, and to report to the circuit's Chief Judge any case in which the judge has not ruled in more than 60 days. The 4th and 5th District Courts of Appeal have held that the 60 day limit approaches an outside time limit.

3 months delay required a new trial in **Polizzi v Polizzi,** 600 So 2d 490 (5th DCA 1992)

7 **months delay** required a new trial in **Tunnage v Bostic,** 641 So 2d 499 (4th DCA 1994)

Thereafter, these Courts say, the presumption of correctness that a judge was able to remember the demeanor of witnesses, their testimony, and the dynamics of the trial, **is so slight** that a new trial must be held.

The United States Supreme Court recognized the injustice of reliance on a judge's memory after a lapse of three months when it condemned the use, in lieu of a transcript, of a reconstruction of the record made by a judge three months after trial in the case of **Draper v State of**

Washington, 1963, 372 US 487, 83 S Ct 774 at 780, 9 L Ed 2d 899.

The Order on Remand in the case at bar was entered on October 2, 1994. That was:

28 months (842 days) after Judge Newman stated his notes were incomplete and lost, and **he did not remember** all of the testimony (June 12, 1992);

31.3 months (938 days) after the **last day of trial** on the merits (March 8,1992 [there never was a hearing on damages]).

31.5 months (942 days) after he said, before **Plaintiffs** (Respondents in this Petition) had finished their case in chief, that **he** had heard enough and **was ready to rule** (March 4, 1992).

46.5 months (1,399 days) after the **first day of trial** (December 3, 1990).

The same error occurred in the entry of the first *Order Surcharging Eileen Brake*. That Order was entered on June 10, 1993, **15 months (469 days)** after the last day of trial on March 8, 1992, and one year after Judge Newman stated that he did not remember the testimony and his notes were incomplete or missing.

Like the second panel, the first panel failed to address this staleness/ timeliness issue.

Timeliness, as set forth in Opinions of the other Districts, is particularly pertinent to the case at bar. In the first panel, Judge Schwartz, in dissent, said that there was no evidence of breach of fiduciary duty and that the Order should be reversed (thus making the staleness and

disqualification issues moot as to his decision). Judges Cope and Hubbart stated that they thought there was "sharply conflicting" evidence, and therefore they would rely on the trial judge's memory and sustain the decision as being in his discretion, since he had seen the witnesses and presumably remembered their testimony, demeanor and trial dynamics. This reliance made the staleness and disqualification issues a vital threshold to their decision. Neither Judge Cope nor Judge Hubbart addressed these two issues.

But if the trial judge's memory failed him and his notes were lost or incomplete after only 3 months, how can his memory be trusted to adjudicate fairly between "sharply conflicting" facts a full year after those remarks, and **15 months** (469 days) after the end of trial (especially without a transcript to review)?

The 4th and 5th District Courts (and the United States Supreme Court) ruled that it could not be done. The Third District Court of Appeal failed to address the issue.

Because of the admitted failure of memory and the untimeliness of both Orders, Petitioner asked the second panel to reconsider the failure of the first panel to order a new trial in the first appeal, and pointed to the second panel's authority to do so under **Strazzulla v Hendrick,** Fla, 1965, 177 So 2d 1 and its progeny.

The second panel of the Third District Court of Appeal did not address the staleness/timeliness issue nor its right to revisit the first stale Order.

Unequal protection of the laws is blatant in these simple numbers:

New trial ***required*** by 5th DCA after **3 months**
New trial ***required*** by 4th DCA after **7 months**
New trial ***denied*** by 3d DCA after **15 and 46 months**

(Use of transcript instead of the memory of a judge to reconstruct record **required** by United States Supreme Court **after 3 months)**

The Courts below committed grave error under the 14th Amendment and injustice to Petitioner and to all litigants in the Third District, by ignoring this issue. This Court should grant the requested remedy and correct the error for Petitioner and for all of Florida.

c. **Disqualification of the trial judge for the appearance of bias.**

Petitioner pointed out to the Courts below in her briefs that disqualification under these circumstances was held to be required in the 4th District Court case of **Levine v State,** 650 So 2d 666 (4th DCA 1995). She also pointed out that Federal Courts, which operate under similar statutes and rules, require disqualification under these circumstances.

Because the reasons for the disqualification in the case at bar were not a simple token to manufacture a formal reason for disqualification, but were so strong, as evidenced by human nature and the immediate retaliation against the undersigned, as to make any person fearful of further retaliation, disqualification should have been mandated. The Third District Court of Appeal did not even address this issue.

Unequal protection of the law under the 14th Amendment is inherent in the decisions. This Court should grant the requested relief.

CONCLUSION

Floridians are entitled to be governed by the same rules of law regardless of whether they live in Miami, or West Palm Beach, or Daytona Beach. This case involves not only conflicts between District Courts "with resulting injustice to the immediate litigant" but how these conflicts may be resolved by the Supreme Court. In addition, this case involves important issues of public policy, namely, i) the length of time a judge in a non-jury case may take to make a decision, and ii) when disqualification is appropriate.

Ignoring these issues violates not only the due process and equal protection clauses of the 14th Amendment to the United States Constitution, but also the most elemental sense of fairness and justice. The experience of other jurisdictions, and common sense, show reasonable ways to grant relief to litigants without unduly burdening the Florida Supreme Court with work.

This Court should hold:

a. That the clause in the Florida Constitution, and its interpretation by the Florida Supreme Court that the Florida Supreme Court may never exercise its conflict jurisdiction to cure outrageous discrepancies between the District Courts of Appeal unless there is a written opinion, is a violation of 14th Amendment due process and equal protection.

b. That the failure of the Courts below to order a new trial for staleness as required by the 4th and 5th District Courts of Appeal, is a violation of 14th Amendment due process and equal protection.

c. That the failure of the Courts below to require disqualification of the trial judge under even stronger circumstances than those which required disqualification in the 4th District Court of Appeal is a violation of 14th Amendment due process and equal protection.

Respectfully submitted

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APPENDIX

(1) Decisons Sought to be Reviewed

SUPREME COURT OF FLORIDA

EILEEN M. BRAKE

Petitioner

CASE 86,752
3RD DCA 93-1514
94-2615

THIRD DISTRICT COURT OF APPEAL

Respondent

The petitioner in the above cause has filed a Petition for Writ of Mandamus and Other Relief, and the same having been duly considered, it is ordered that said Petition be and the same is hereby denied.

Overton, Kogan, Harding, Wells and Anstead, JJ., concur

(Certification and mailing list omitted)

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT

EILEEN M. BRAKE

Appellant

vs.

EVE E. MURPHY and RICHARD MURPHY

Appellees

Opinion filed August 16, 1995

An appeal from the Circuit Court for Dade County, Robert H. Newman, Judge

Robert M. Brake, for appellant

Harold M. Braxton and Richard T. Kozek, Jr., for appellee.

Before NESBITT, GODERICH and GREEN, JJ

PER CURIAM

Affirmed

IN THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

EILEEN M. BRAKE

Appellant

JANUARY TERM, A.D. 1994

vs.

EVE MURPHY, et al

Appellees

CASE NO. 93-1514

Opinion filed March 22, 1994.

An appeal from the Circuit Court for Dade County, Robert H. Newman, Judge.

Robert M. Brake, for appellant.

Harold Braxton and Richard T. Kozek, Jr., for appellees

Before SCHWARTZ, C.J. and HUBBART and COPE JJ.

PER CURIAM

Eileen Brake appeals an order surcharging her pursuant to section 733.609, Florida Statues (1991), for negligence and breach of fiduciary duty as personal representative of the estate of Eileen E. Murphy. We affirm in part and reverse in part.

After approximately eighteen days of evidentiary hearings, the trial court found that Eileen Brake had "acted improperly and in bad faith in the actions she undertook or failed to undertake while serving as . . . personal representative." The trial court found that Ms. Brake had failed to act prudently in selling an office building which was the estate's largest asset. There was sharply conflicting evidence, which the trial court heard at length. As the findings are supported by substantial competent evidence, the judgment is affirmed with one exception.

One of the surcharge components considered by the trial court was the legal expenses incurred by the estate in defending a foreclosure action brought by Ms. Brake to foreclosure four mortgages on the office building. The order states:

> Eileen Brake breached her fiduciary duty as personal representative by filing a foreclosure action against the estate and the beneficiaries, which action on her party required substantial additional legal proceedings and attorney's fees and ultimately resulted in three of her four mortgages being declared an indebtedness of the estate, with additional interest and with the award of attorneys' fees to her husband, Robert Brake, in the

amount of $40,000, which created and additional expense to the estate.

The first three of the above mentioned mortgages were mortgages placed on the office building prior to the demise of Eileen E. Murphy.[1] The fourth mortgage was placed on the office building while Ms. Brake was personal representative.

As the probate proceedings grew protracted, the trial court found it necessary to appoint an administrator ad litem to take charge of the office building. At the time Ms. Brake filed the foreclosure action, she was still personal representative of the estate, but was no longer in control of the office building. In the foreclosure action the administrator ad litem served as the representative of the estate. As Florida Probate Rule 5.120 (a) indicates, "When it is necessary that the estate of a decedent ... be represented in any probate ... proceeding and . . . the personal representative . . . is . . . interested adversely to the estate . . or is enforcing the personal representative's. . .own debt or claim against the estate. . .the Court may appoint an administrator ad litem..." Furthermore, upon the filing of the foreclosure action, Ms. Brake was removed as personal representative.

Under the statute regulating personal representatives, "If the exercise of power concerning the estate is improper or in bad faith, the personal representative is liable to interested persons for damage or loss resulting from a breach of his fiduciary duty to the same extent as a trustee of an express trust." Florida Statutes Section 733.609, 1991. The statute by its terms applies to improper conduct while exercising one's power as personal representative. In this case the trial of the foreclosure action took place when Ms. Brake was acting in her individual capacity, not as personal representative, and the foreclosure action was defended on behalf of the estate by Herbert Stettin as administrator ad litem.

When the foreclosure action was tried,[2] the court found in Ms. Brake's favor on the first three mortgages. The court found the fourth note and mortgage[3] "voidable at the election of beneficiaries and therefore unenforceable because it was made in violation of Section 733.610, F.S.."[4] Thus Ms. Brake was the prevailing party with respect to three of the four mortgages.

Appellee Eve Murphy acknowledges that Ms. Brake was acting in her individual capacity in the foreclosure action, and that the estate's interest were being defended by the administrator ad litem. Appellee argues, however that the surcharge is nonetheless appropriate. She reasons that if Ms. Brake had proceeded diligently to sell the office building, then the foreclosure action never would have been necessary because the mortgages would have been paid off with the proceeds of the sale.

It is true that the trial court found Ms. Brake guilty of neglect and breach of fiduciary duty with respect to the sale of the office building. However, the evidence was uncontroverted that Ms. Brake filed the foreclosure action only because of the fact that the statute of limitations for foreclosure was to expire with respect to one of the mortgages. Appellees do not dispute that Ms. Brake sought a waiver of the statute of limitations from the estate and beneficiaries, so that it would not be necessary to file the foreclosure action. That waiver was refused. Three of the four mortgages were found to be valid and enforceable. Under these circumstances, we do not see how Ms. Brake can be surcharged with respect to the first three mortgages. In view of the fact that the fourth mortgage was invalidated because it was an encumbrance in favor of the personal representative obtained without required court approval, see Florida Statutes Section 733.610 (1991), we conclude that a surcharge would be within the discretion of the trial court to

assess for a reasonable allocation attributable to that one mortgage.

We have carefully considered the other points on appeal and conclude that no other reversible error has been shown.

The order of surcharge is affirmed except with respect to so much of the surcharge as relates to the mortgage foreclosure action. The mortgage foreclosure aspect of the surcharge order is reversed and the cause is remanded for further proceedings consistent herewith.

Affirmed in part, reversed in part, and remanded.

HUBBART and COPE, JJ., concur

SCHWARTZ, Chief Judge (dissenting in part).

Contrary to the majority, I do not believe that the evidence supports the surcharge imposed upon Ms. Brake for her actions in the dispostion of the office building which formed the bulk of the estate. While the results of the negotiations she conducted were unfavorable, there was no indication, as required to support such a claim, that she acted in "bad faith or want of due prudence and diligence" in that respect. First Trust & Sav Bank v. Henderson, 101 Fla 1437, 1436, 136 So 370, 371 (1931). Since a personal representative is not an insurer of the success of her dealing with estate property, Henderson; In re Estate of Wilson, 116 So 2d 440 (Fla. 2d DCA 1959), I would reverse the judgment below in its entirety. See Henderson; In re Estate of Pearce, 507 So 2d 729 Fla. 4th DCA, 1987); In re Estate of Wilson

[1] Two of the mortgages were in favor of Eileen Brake. One of the mortgages was in favor of Eileen E. Murphy, but was assigned to Eileen Brake.

[2] The foreclosure action was tried before a different judge than the judge presiding in the probate proceeding.

[3] The fourth mortgage was in favor of Eileen M. Brake and Robert M. Brake.

[4] Section 733.610, Florida Statutes (1991), provides:

> Any sale or encumbrance to the personal representative or his spouse, agent, or attorney, or any corporation or trust in which he has a substantial beneficial interest, or any transaction that is affected by a conflict of interest on the part of the personal representative, is voidable by any interested person except one who has consented after fair disclosure, unless
>
> (1) The will or a contract entered into by the decedent expressly authorized the transaction; or
>
> (2) The transaction is approved by the court after notice to interested persons

(2) Orders on Rehearing

IN THE DISTRICT COURT OF
APPEAL OF FLORIDA
THIRD DISTRICT

EILEEN M BRAKE JULY TERM, A.D. 1995

Appellant

WEDNESDAY, OCTOBER 11, 1995

vs.

EVE E. MURPHY, et al., CASE NO. 94-2615

Appellees

_____/

Upon consideration, appellant's motion for leave to amend motions for rehearing and rehearing en banc is hereby granted. Appellant's amended motion for rehearing, second amended second section of motion for rehearing and motion for certification to the Supreme Court are hereby denied. Appellant's motion for leave to file Rule 1.540 motion is denied without prejudice to raise before the trial court. Appellant's motion to strike response to amended motion for rehearing and amended motion for rehearing en banc, and motion to strike appellees' response to motion for leave to amend motion for rehearing are denied. NESBITT, GODERICH and GREEN, JJ., concur. Appellant's amended motion for rehearing en banc is denied.

(certification and mailing list omitted)

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT

EILEEN M BRAKE

Appellant

vs.

EVE E. MURPHY, et al.,

Appellees

_____/

JANUARY TERM, A.D.1994

JUNE 7, 1994

CASE NO. 93-1514

Upon consideration, appellees' motion for rehearing is hereby denied. Appellant's motion for rehearing is denied. Appellant's Motion to Quash Lower Court Order on Report of Administrator Ad Litem' " is denied. Appellant's Motion to Restrain Actions of Lower Court Pending Issuance of Mandate" is denied. Appellant's Eileen M. Brake's Suggestion of Question of Great Public Importance" is denied. Schwartz, C.J., and Hubbart and Cope, JJ., concur.

Appellees' motion for clarification is granted. The surcharge with respect to the mortgage foreclosure action is reversed. The trial court may, in its discretion, impose a surcharge for so much of the foreclosure action as is fairly attributable to the fourth mortgage. Hubbart and Cope, JJ., concur. Schwartz, C.J., dissents.

Appellants's motion for rehearing en banc is denied

(3) Additional places where 14th Amendment questions raised

DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

EILEEN M. BRAKE

Appellant

Case No 94-2615

vs

Lower Tribunal
No 89-5327

EVE E. MURPHY, et al,

Appellees

MOTION FOR REHEARING

Appellant respectfully moves this Honorable Court to grant a rehearing of the Order entered on August 16, 1995, on the grounds that this Court has overlooked or misapprehended the following matters of fact and rules of law requiring reversal, to-wit:.

1. **The failure to rule promptly.**

A. ***The overlooked or misapprehended points of law.***

The **4th and 5th District Courts of Appeal** have held that Rule 2.050 (f), Florida Rules of Judicial

Administration require a trial judge in a non-jury trial to rule promptly after trial is ended, and that the rule suggests that 60 days (less than **6.4%** of the time in this case) approaches an outside time limit. After this time, the Courts say, the presumption of correctness that a judge was able to remember the demeanor of witnesses, their testimony, and the dynamics of the trial, is so slight that a new trial should be held.

...Failure of this Court to follow these conflicting precedents from the other districts, or to write an opinion explaining its disagreement, or failing to certify this question as requested in the briefs by Appellant, deprives Appellant of equal protection of the laws, due process, and an open forum for decision of disputes, as guaranteed by the Constitutions of Florida and the United States

2. **The Disqualification issue**

A. ***The overlooked or misapprehended points of law.***

. . .On like facts the 4th District Court of Appeal in **Levine v State**, 1995, 650 So 2d 666, held that disqualification was required. . .

C. Failure of this panel to follow the precedents from this Court and the 4th District, **or** to refer this question to the entire Court for an en banc decision, **or** to write an opinion explaining its disagreement, **or** failing to certify this question as requested in the briefs by Appellant, deprives Appellant of equal protection of the laws, due process, and an open forum for decision of disputes, as guaranteed by the Constitutions of Florida and the United States.

(Balance of the Petition and the Certificate of Mailing is omitted).

DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

EILEEN M. BRAKE,
Appellant, Case No 94-2615

vs Lower Tribunal No 89-5327

EVE E. MURPHY, et al,

Appellees

REPLY BRIEF OF APPELLANT

(Portions omitted)

As pointed out in Appellant's main brief, the Fourth and Fifth District Courts of Appeal have held that such confused judgments, when made more than 90 days after trial has ended, require retrial. . .

If the "equal protection" clause means anything, then a new trial should be granted in the Third District as well. If this Court disagrees with the rulings of its sister Courts, Appellant respectfully request this Court to certify this question to the Florida Supreme Court to reconcile the difference between districts.

(Balance of Brief and Certificate of Mailing omitted)

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

EILEEN M. BRAKE,

Petitioner

vs CASE NO: 86,752

DISTRICT COURT OF APPEAL, DCA Nos 93-1514,
THIRD DISTRICT OF FLORIDA 94-2615

Respondent

_____/

PETITION FOR WRIT OF MANDAMUS
AND/OR
PETITION FOR WRIT OF CERTIORARI
AND OTHER RELIEF

(portions omitted)

Failure of Respondent to honor said conflicting decisions on procedural matters deprives both Petitioner and all litigants within the 3d District Court of Appeal's jurisdiction of equal protection of the laws and access to the Courts of this State, as guaranteed by the 14th Amendment to the Constitution of the United States, and Article 1, Sections 2 and 21 of the Florida Constitution, because: 1) litigants are denied decisions while the memory of the Court is fresh, whereas litigants in the other Districts are given said procedural protection, and 2) litigants are denied the right to trial by judges under circumstances which do **not** give a reasonable appearance of bias against Petitioner and in favor

of the opposing party and her attorneys, unlike litigants in other Districts.

Respondent further deprived Petitioner of her said Constitutional rights by failing to express in an opinion its reasons for refusing to adhere to the principles of law established by these other Courts, thus preventing Petitioner from seeking normal conflict review. Failure of this Court to grant Petitioner's requested remedy would constitute a third deprivation of Petitioner's Constitutional rights to equal protection of the laws.

By a judicious use of mandamus (or, in the alternative, common-law certiorari) this Court can 1) fulfill its duty to insure equal protection of the laws; 2) reasonably control its docket; 3) discourage District Courts from hiding conflict by failing to write opinions; and 4) encourage uniformity between Districts which will then know their efforts will be subject to review.

(Certificate of Mailing omitted)